No. 21767

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Petition of WATERMAN STEAMSHIP CORPORATION, a corporation, owner of the vessel SS CHICKASAW, for exoneration from or limitation of liability,

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GAY COTTONS, INC., *et al.*,

Cargo Claimants,

SHALOM BABY WEAR,

Cargo Claimant,

UNITED STATES OF AMERICA,

Cargo Claimant.

On Appeal From the Judgment of the United States District Court for the Southern District of California.

REPLY BRIEF OF APPELLANT WATERMAN STEAMSHIP CORPORATION.

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I.

THE FINDINGS OF FACT.

A basic misconception with respect to the Findings of Fact of the lower court is apparent from the very inception of appellees' briefs and permeates their entire argument thereafter. Appellees assert that the lower court found, in the second paragraph of Finding of Fact 6 [Clk. Tr. p. 848] that appellant, the negligence of Captain Patronas aside, failed to exercise due diligence to make the CHICKASAW seaworthy and had privity or knowledge of the unseaworthiness of the

CHICKASAW's fathometer. Appellee, United States of America (hereinafter "The Government"), calls this the finding of Waterman's "direct fault" (see *e.g.* Government's answering Brief, pp. 7 and 73). Appellees Gay Cottons, *et al.* (hereinafter "private cargo"), consistent with their practice throughout, are not so direct, but the effect is the same; they too contend that the lower court found fault of appellant sufficient to deny exoneration and limitation of liability in addition to the negligence of Captain Patrons (see *e.g.* private cargo's brief, pp. 5, 24, 25, and 34). The arguments derived from this misinterpretation of the findings have two strands: First, that appellant, irrespective of Captain Patronas' negligence, failed to exercise due diligence to make the vessel seaworthy at and prior to the commencement of the voyage and thus was not entitled to exoneration; and, second, that, again irrespective of Captain Patronas' negligence, appellant had privity or knowledge of the unseaworthiness of the fathometer and therefore is not entitled to limitation of liability. The detail of these arguments and the facts utilized to support them will be analyzed in subsequent sections. However, it is worthwhile now to examine how appellees reach their erroneous conclusion with respect to the Findings of Fact and to demonstrate why this conclusion is erroneous.

Appellees accomplish their result by taking portions of selected Findings of Fact, shuffling them around, and splicing them together with data they imply forms the foundation of the findings, ignoring the rejection by the lower court of Findings of Fact embodying the matters they now seek to reintroduce. Specifically, private cargo takes the first two sentences of Finding of Fact 4 [Clk. Tr. p. 846] in which the Court found the CHICKASAW unseaworthy at the commencement of the voyage in question and skips over the

reasons for the unseaworthiness to the first full sentence in the third paragraph of Finding of Fact 4 [Clk. Tr. p. 847] dealing with the condition of the fathometer some two weeks after the stranding. They then omit entirely Finding of Fact 5 [Clk. Tr. p. 847], dealing with want of due diligence, and the first three-fourths of Finding of Fact 6, dealing with Waterman's alleged privity, fault and knowledge, and proceed directly to the second paragraph of Finding of Fact 6 to create the impression that this latter paragraph, rather than being merely a conclusion drawn from the remainder of Finding of Fact 6, has an independent life of its own relating to direct fault on the part of Waterman. (private cargo's brief, pp. 24 and 25). To this they then add the following language:

> "To repeat briefly the evidence, a fathometer should be inspected annually [Rep. Tr. p. 693]. But nobody touched the CHICKASAW's fathometer during the five years before the stranding except to give it three coats of paint [Rep. Tr. p. 686]. How can it be contended then that either this condition, or the lack of due diligence, dated from December 25, 1961? And, how can it be contended that this is fault ascribable solely to Captain Patronas? For it represents at least five years of neglect and Patronas joined the ship on November 3, 1961 [Rep. Tr. p. 55], a bare three months before she was lost."

None of this latter is in the findings nor supported by the evidence.

Private cargo then returns (see private cargo's brief, pp. 34-36) to what they call the "even if" findings. They return to the gist of Findings of Fact 4 [Clk Tr. p. 846] where the Court finds unseaworthiness because of uncertainty with respect to the condition of the

fathometer, weave in the finding that Captain Patronas failed to exercise due diligence by taking steps to ascertain the condition of the fathometer [Finding 5, Clk. Tr. p. 847], and then at long last turn to the meat of Finding 6 [Clk. Tr. p. 847] dealing with appellant's delegation of authority to the master. By this restructuring of the Court's findings, appellees seem to create two alternative grounds out of one:

(1) The CHICKASAW, so they allege, was found to be unseaworthy as a result of a longstanding condition of the fathometer, which condition existed as a result of the lack of due diligence of appellant and with appellant's privity or knowledge; and

(2) "Even if" the preceding ground for denying exoneration and limitation did not exist, this relief must be denied because the fathometer was unseaworthy due to uncertainty as to its condition. This uncertainty was known to Captain Patronas, who negligently failed to take any action with respect to it, and this negligence was with the privity or knowledge of appellant because of the authority delegated to him by appellant.

All of this is very smooth and compelling but wholly misleading. The Court did not proceed in any such haphazard manner.[1] It approached its task logically and directly, denying both exoneration and limitation *solely* because for both purposes it imputed the negligence of Captain Patronas to appellant. Appellant's dispute with these findings is that they are predicated upon erroneous legal assumptions.

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[1]The technique of restructuring the lower court's findings on a piecemeal basis to attempt to develop a coherent theory for affirmance has frequently been rejected by this Court. See *e.g. Welsh Co. of California v. Strolee of California, Inc.*, 290 F. 2d 509, 511 (9th Cir. 1961). *Cf. Mladinich v. U.S.*, 371 F. 2d 940, 942 (5th Cir. 1967).

In this case there would be no liability if there were no unseaworthiness. The Court found, in Finding of Fact 4 [Clk. Tr. p. 846], that the CHICKASAW was unseaworthy because of its fathometer.[2] But a finding of unseaworthiness was not enough to deny either exoneration or limitation;[3] it was also necessary in order to deny exoneration for the Court to find a want of due diligence. The Court did so in Finding of Fact 5 which states in full as follows:

> "(5) *Want of due diligence*
>
> Captain Patronas failed to exercise due diligence to make the fathometer seaworthy because, with knowledge of the uncertainty with respect to its condition, he took no steps to repair or check it."

But this too was not enough if limitation was to be denied in addition to the denial of exoneration. Therefore, the Court went on in Finding of Fact 6 to deal with the question of appellant's privity and knowledge. Because of the importance of the interpretation of this Finding of Fact, appellant sets it forth in full:

> "(6) *Waterman's privity, fault and knowledge*
>
> It was the WATERMAN STEAMSHIP CORPORATION's obligation to exercise due diligence to make the SS CHICKASAW seaworthy at the commencement of the voyage from the Far East. This included an obligation that the ship's navigational equipment be put in a suitable state of repair before going to sea. WATERMAN STEAMSHIP CORPORATION operated a regularly scheduled service, carrying cargo from all

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[2]Analysis of just what unseaworthiness the Court found will be deferred for discussion to Section IV, *infra*.

[3]The Government's argument to the contrary will be dealt with in Section IV, *infra*.

the Far East ports for regularly commenced voyages, and it had a general agent in the Far East, EVERETT STEAMSHIP CORPORATION, which performed the function of the owner only as respect to scheduling cargo, arranging stevedoring, tug and other necessary services. WATERMAN STEAMSHIP CORPORATION did not give EVERETT authority to direct repairs. As to repairs, WATERMAN placed all authority, including authority to decide whether repairs should be made at all, with the Master, and had in the Far East no supervisory or managerial personnel to carry out its obligations to exercise due diligence to make the vessel seaworthy. WATERMAN therefore had delegated to the Master its entire managerial responsibility as respects such repairs at the commencement of this voyage and therefore WATERMAN had knowledge, privity, and is at fault for the decision not to repair the fathometer.

"Due diligence was not exercised to make the SS CHICKASAW seaworthy and that the loss of the vessel, the absence of due diligence, the unseaworthiness of the fathometer occurred with the privity, fault and knowledge of the WATERMAN STEAMSHIP CORPORATION."

It is clear from the Findings of Fact that there was only one ground for denying limitation, not two alternative grounds, and that this ground was dependent upon the negligence of Captain Patronas in failing to take steps to check or repair the fathometer [Finding 5, Clk. Tr. p. 847]. Two further factors confirm this conclusion. The first is the Court's Memorandum Opinion which is important in inter-

preting the findings. That Opinion stated in pertinent part as follows:

> "I find, therefore, that the inoperability of the fathometer, or at least the uncertainty as to its proper operation after it had worked erratically was unseaworthiness which in this case had contributed to the grounding. Petitioner is, therefore, barred from exoneration.
>
> "Let us consider now the question of limitation of liability.
>
> "It is conceded that the shipowner has a duty to use due diligence to make the vessel seaworthy at the commencement of its voyage. It appears that the CHICKASAW visited all ports in the Orient subsequent to the date of the entry in the rough log relating to the defective fathometer. We may assume, therefore, that whenever the western voyage commenced, it was in any event after the defect was noted, so that at the commencement of the voyage the WATERMAN STEAMSHIP CORPORATION had the duty to put the fathometer in a seaworthy condition. Petitioner, however, seeks to limit its liability in this area under the provisions of Title 46 U.S.C.A. Section 183, contending that even though there were a lack of diligence in preparing the vessel for its voyage, it occurred without the privity of knowledge of the owner.
>
> "Upon whom in the Orient would the responsibility and authority rest to make necessary repairs and to put the ship in a seaworthy condition before the voyage? The evidence discloses that the EVERETT STEAMSHIP COMPANY was the agent for petitioner in the Orient but only for the purpose of making arrangements and facilitating any work which the company wished

to have done. The authority to initiate the work and the responsibility for having it done rested with the Captain. Evidence failed to disclose any one of high rank in a managerial hierarchy or with greater authority in the Orient than Captain Patronas. In this case, Captain Patronas was also charged with the knowledge of a defectively operated fathometer and did nothing about it.

"I find, therefore, from the evidence adduced that Captain Patronas was negligent in failing to check and repair, if need be, the erratically operating fathometer and that this negligence was indeed the negligence of WATERMAN STEAMSHIP CORPORATION since Captain Patronas was its duly authorized agent to determine the necessity for such repairs and to get them done if need be." [Clk. Tr. p. 762].

Nowhere in the entire discussion of negligence with respect to both exoneration and limitation, all of which is set forth above, is there *any* mention of *any* negligence or fault on the part of any employee or agent of Waterman Steamship Corporation, except that of Captain Patronas. Thus, it is clear that when the Findings of Fact were prepared it was not the Court's intent to find privity and knowledge on some basis other than Captain Patronas' negligence. In view of the Court's opinion, if the Court had intended to find a basis for denying limitation other than imputation of Captain Patronas' negligence, it would have clearly so stated and not left this critical conclusion to be derived from a tortured reconstruction of its findings. Yet, just as the opinion points to no one other than Captain Patronas, so too, the Findings of Fact point

to *no* act or omission on the part of *anyone* associated with Waterman other than the Master upon which a finding of privity or knowledge could be predicated. This absence in findings as comprehensive as those of the lower court in this case is revealing, and particularly so in view of the history of Findings of Fact in this case, the second factor buttressing appellant's interpretation of the findings.

The first set of Findings of Fact lodged in this case was prepared by appellees and lodged with the Court on August 29, 1966 [Clk. Tr. pp. 888-900]. These proposed findings would have had the Court specifically find that some seven pieces of equipment were unseaworthy, the unseaworthiness of six being causally related to the stranding, and that *Waterman* failed to exercise due diligence with respect to each of these pieces of equipment (see proposed Finding of Fact 4, Clk. Tr. p. 891]. In addition, these proposed findings would have had the Court find, in a separately stated finding, that *Waterman* had privity, knowledge and fault, of the lack of due diligence to make seaworthy and the unseaworthiness of the CHICKASAW [proposed Finding 11, Clk. Tr. p. 886]. Finally, the proposed findings would have had the Court find specifically that Waterman had privity and knowledge with respect to the unseaworthiness, because of alleged managerial fault in the appointment of Patronas and the directions given him [proposed Finding 14, Clk. Tr. p. 898], instructions not to repair[4]

[4]Appellees throughout their briefs, time after time, lay great stress on the so-called instruction to "Make no Repairs" (private cargo Brief, pp. 17, 51, Government Brief, p. 78). This is

(This footnote is continued on the next page)

[proposed Finding 13, Clk. Tr. p. 898], and failure to supervise and inspect [proposed Finding 16, Clk. Tr. p. 899]. After objection by appellant to the proposed Findings of Fact [Clk. Tr. p. 779], the Court took the matter of Findings of Fact under submission [Clk. Tr. p. 839] and ultimately accepted a second set of Findings of Fact based upon modifications directed by the Court [see Clk. Tr. p. 843]. Yet, it is just what was rejected in these findings that appellees now use as factual justification for what they claim to be the Court's finding of "direct fault" on the part of appellant sufficient to deny exoneration and limitation without regard to the actions of Captain Patronas.

It was in this context that appellant focused in its Opening Brief on the principal legal issue presented by the Court's Findings of Fact, namely, *was the position of Captain Patronas such that his negligence should be imputed to appellant for the purpose of denying limitation of liability?* This review of the findings makes it clear that the arguments of appellees, insofar as they deal with issues other than those raised in appellant's Opening Brief, must stand or fall not on the Findings of Fact, but on the never articulated contention that the trial court's failure to find direct fault on the part of Waterman was clearly erroneous.

We turn now to the argument.

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simply a red herring. The lower court did not find that there were any such instructions and rejected a proposed finding that the instructions referred to were a factor in this case [proposed Finding 13, Clk. Tr. p. 898]. The fact is that the language referred to by appellees [Ex. 92] is simply a paraphrase of the law applicable to subsidized steamship operators as set forth at 46 U.S.C.A. Sec. 1176. There is no evidence in the record whatsoever that indicates that this letter was interpreted by the personnel of the CHICKASAW as meaning they should not obtain repairs to malfunctioning navigational equipment in foreign ports. Indeed, as the Court found [Clk. Tr. p. 848], the Master did attempt to have repairs made in Japan to the one piece of equipment he felt needed them, the radar.

II.

ADMISSION OF THE DEPOSITION OF JOHN E. JENSEN WAS ERROR AND WAS PREJUDICIAL TO APPELLANT.

Appellees' argument makes it essential that appellant recount in some detail the circumstances surrounding the admission of the testimony of Captain Slack. His testimony is one of the bases relied upon by appellees for the admissibility of the incomplete deposition. Appellees claim that Slack's testimony was based "in part on abstracts of depositions, including Jensen's deposition furnished by counsel (for appellant)." [Rep. Tr. p. 526]. Inspecting that citation, the Court will note that appellees in their cross-examination led Slack into testimony that he had read abstracts from depositions including that of Mr. Jensen. Subsequently, the Court stated its assumption that Slack had read the deposition of Jensen [Rep. Tr. p. 530]. From page 533 of the Reporter's Transcript, it is clear that what Captain Slack saw was "a commentary which was taken from various information. It didn't actually include the depositions. There were abstracts from the depositions." Counsel for appellant advised the Court that what Slack had seen was a report letter directed to appellant. One of the attorneys for appellees at that point stated that he did not wish to view the letter nor did he ask for it. Thereafter, Slack stated that he had been advised of Captain Patronas' statement that Jensen had advised him that the fathometer was working erratically and that Patronas had told Jensen to make an entry in the log book [Rep. Tr. p. 534]. There is no other indication of information furnished to Slack from statements of Jensen on which Slack's opinion was based. Contrary to appellees' contention, appellant did not "open a field of inquiry that is not com-

petent or relevant to the issues in the case." Neither did appellant attempt to place in evidence the deposition testimony of Jensen, thereby waiving its right to cross-examination. As elsewhere in their Brief, the cases cited by appellees are simply not germane to this issue.

The facts are that Jensen's deposition was continued due to his illness. At the time of adjournment, his direct examination had not been completed. When appellees sought to resume, it was learned that Jensen had died. As stated in appellant's Opening Brief in every case, except one, in which the issue of admissibility of a deposition where no cross-examination had taken place is considered, *the Court in admitting the deposition did so where the objecting party had conducted its examination.* The single exception is *Inland Bonding Company v. Mainland National Bank of Pleasantville,* 3 F.R.D. 438 (N.D. N.J. 1944). It is apparent from a reading of that case that the Court relied heavily upon Professor Wigmore's *Work on Evidence.* At page 439 of its decision, the Court quotes a portion of that work. We submit that it is applicable here.

> "But, where the death or illness prevents cross-examination under such circumstances that *no responsibility* of any sort can be attributed to either the witness or his party, it seems harsh measure to strike out all that has been obtained on the direct examination. Principle requires in strictness nothing less. But the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss."

The reason why the testimony should not have been admitted is because in this situation the lack of cross-

examination was "a material loss." The deposition contained the only basis found by the trial court of a causal connection between the fathometer and the stranding. The prejudice is further illustrated in light of the fact that the Coast Guard testimony, which had been concluded before the commencement of the deposition, was not damaging to appellant's position. The net effect of the Coast Guard testimony was that at the time Jensen reported the fathometer was working erratically in the Inland Sea, there was only 10 or 15 feet of water under the keel of the CHICKASAW and in Jensen's opinion, a fathometer ordinarily would not work "very good" under those conditions. Coast Guard Exhibit "I" page 228.

Lastly, the relevant portion of *MacDonnell v. Capital Co.,* 130 F. 2d 311, does not deal with weight of the evidence as suggested by appellees but rather with consideration of improper evidence.

> "Moreover, as to the questions raised relative to the admission or exclusion of evidence, we point out that the cause was tried to the court without jury, and under the circumstances such questions become relatively unimportant, the rules of evidence relating to admission and exclusion being intended primarily for the purpose of withdrawing from the jury matter which might improperly sway the verdict, and not for the trial judge, who is presumed to act only upon proper evidence."

In our case there is no "proper evidence" in the Jensen deposition as it was entirely inadmissible. Therefore, as the Court acted on this testimony to find a causal connection between the alleged condition of the fathometer and the stranding, the prejudicial effect of the admission is clear and the presumption of propriety is rebutted.

III.

THE "PENNSYLVANIA RULE" HAS NO APPLICATION TO THE INSTANT ACTION.

The so-called Pennsylvania Rule derives from the United States Supreme Court decision in *Pennsylvania v. Troop,* 86 U.S. 148 (1873). In that case a collision in fog occurred between a steamer and a bark. The steamer was clearly at fault for excessive speed in fog. The principal question before the Court was whether the violation of the rules of the road by the bark contributed to the collision. The Court concluded that it did because the violation of a statute by the bark shifted to it the burden of providing that this violation was not a cause of the collision. Thus, the Pennsylvania Rule, in order to enforce compliance with certain kinds of statutes, assists in filling in the causal gap between violations of those statutes and casualties by shifting the burden of proof on causation to the party guilty of the statutory violation. As the Court stated in *The AAKRE,* 122 F. 2d 469 (2nd Cir. 1941):

> "Indeed, however the Pennsylvania Rule was originally stated, the history of its application shows that it has done no more than shift the burden of proof with respect to causality." (at p. 474).

At the trial court, appellees had the burden of proving, for the purposes of both exoneration and limitation, the causal link between any alleged unseaworthiness and the casualty. When the Pennsulvania Rule is applied, it eliminates the need of proof of causation with respect to statutory violations. Thus, at the trial court, appellees had the burden of establishing, in order to invoke the Pennsylvania Rule:

(1) Violation of a relevant statute; and

(2) That the Pennsylvania Rule is applicable to statutes governing navigational equipment and to COGSA cases.[5]

Since the trial court found neither a statutory violation nor that the Pennsylvania Rule was applicable in this case, appellees' burden on this issue on appeal is at least as great, if not greater, than it was in the trial court. They have not sustained it.

Appelleees contend two pieces of equipment on board the CHICKASAW violated relevant statutes and regulations; thus assisting them in filling the causal gap between the alleged unseaworthiness and the stranding. The two pieces of equipment in question are the radio direction finder (hereinafter R.D.F.) and the fathometer.

With respect to the R.D.F., the relevant question is did Waterman violate the regulations published at 47 C.F.R. Section 8.517(a)(4) and (b). Section (a)(4) provides that a ship's R.D.F. has to be accurately calibrated for the purpose of taking bearings from which true bearings can be determined for actual use in maritime radio navigation service. And §(b) requires that a record of the calibration of any checks of the accuracy of the R.D.F. be maintained on board the ship for at least one year. These are the requirements for obtaining the F.C.C. certificate, which certificate was granted to the CHICKASAW in November of 1961 [Rep. Tr. p. 961]. The granting of the certificate raised a presumption that the requirements were in fact

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[5]This latter point, on this appeal, is relevant only to the claim by the Government that even if the Court holds the testimony of Jensen improperly admitted, which appellant claims it should, the Pennsylvania Rule establishes causation between the uncertainty with respect to the condition of the fathometer and the loss without need for Jensen's testimony. See Government's answering Brief, p. 45.

met at that time. *The PRINCESS SOPHIA,* 61 F. 2d 339 (9th Cir. 1932).[6] No evidence has been offered to overcome this presumption, and the testimony of Mr. Hall and Mr. Kroh (the F.C.C. examiner and the R.C.A. technician, respectively) extablishes that there was compliance [Rep. Tr. pp. 961 and 982].[7]

The relevant regulation pertaining to the fathometer, 46 C.F.R. Section 96.27-1, requires that vessels such as the CHICKASAW be fitted with an efficient elec-

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[6]Appellees contend the due diligence required by COGSA, and the lack of privity or knowledge required by the Limitation Statute, is not due diligence in obtaining certificates and imply that the certificates obtained by the CHICAKASAW shortly before the voyage in question were of no relevance, even with respect to statutory fault. See Government's answering Brief at p. 87. It should be noted that certification, when dealing with the question of statutory fault, stands on a different footing than certification as relates to due diligence to make a vessel seaworthy. With respect to determining whether or not due diligence has been exercised to make the vessel seaworthy, certification by the relevant authorities is evidence of what was done, to be considered in deciding the question of due diligence; with respect to a claim of statutory violation, however, the fact that equipment had been certified as not in violation of the statutes in question obviously raises a presumption of compliance with the statutes that must be overcome by the party claiming a statutory violation.

[7]In addition, appellees have confused the distinction brought out at trial by the testimony of Captain Slack [Rep. Tr. p. 613], between "calibration" and "check bearings." The requirement that the R.D.F. be accurately calibrated for the purpose of taking bearings from which true bearings can be obtained does not relate to the use of check bearings but rather to having the equipment calibrated, that is, the built-in adjustment made in the equipment. The testimony of the F.C.C. inspector [Rep. Tr. p. 944] showed that calibration within 5° of the true bearings is acceptable to the F.C.C., and that the R.D.F. on board the CHICKASAW was calibrated within those limits. The same confusion enters into appellees' interpretation of sub-paragraph (b) of the rule. This sub-paragraph does not require keeping on board of a record of the check bearings but rather a record of the calibration of any check bearings. That is, the compensation in the machine for check bearings exceeding the permissible limits. That record, of the 1952 calibration, was on board the CHICKASAW [Ex. 35].

tronic deep-sea sounding apparatus. The Coast Guard is charged with enforcing this regulation. At the time of the annual inspection of the CHICKSAW in November of 1961, the CHICKASAW was found in compliance with this regulation. As with the R.D.F., this raises a presumption of statutory compliance. With respect to the fathometer, appellees therefore have the burden not only of showing the CHICKASAW's fathometer to have been inoperable (see footnote 9, *infra*) but of showing that this violated the regulation. This requires appellees to show that the regulations equate "efficient" with "operable" so that any vessel whose fathometer becomes inoperable is automatically in violation of the regulations and is subject to the penalties provided. In view of the nature of navigational equipment, this is a doubtful proposition and appellees introduced no evidence to support it.

The burden facing a party wishing to show a statutory violation of a certification statute in the face of certification is particularly heavy. Appellees have not carried that burden.

The second requirement faced by appellees in applying the Pennsylvania Rule in this action is a showing that it is applicable to both navigational equipment statutes and to COGSA cases. They have done neither.

The vast majority of cases in which the Pennsylvania Rule has been applied involved collisions where a violation of one of the navigational rules of the road has been shown.[8] In such cases the negligent navigation of the vessel is imputed to the owners and, because there is a dependent relationship between the vessels involved, a violation of a rule of the road is clearly negli-

[8]Indeed, one prominent authority, Griffin, in *Griffin on Collision,* Section 254 at page 579, argues persuasively that the Pennsylvania Rule should apply only to collision cases involving violation of navigational rules of the road.

gent navigation. Application of the Rule in these cases, therefore, acts to inhibit future violations. The other category of cases in which the Rule has been applied consists of cases such as *The DENALI,* 105 F. 2d 413 (9th Cir. 1939), where there is a violation of a statute relating to subjects such as the manning of vessels on owner's instructions. Here, too, the application of the Pennsylvania Rule will inhibit future willful violations. In cases such as the instant one, however, where the violation claimed is failure of the equipment to fulfill the statutes in the interim period between certifications, the application of the Pennsylvania Rule will not act to inhibit future violations. Appellees' position apparently is that the failure of equipment to meet the statutory standards, after certification, is a statutory fault. If this interpretation of the statute were to be accepted, the application of the Pennsylvania Rule would affect the outcome only of the case under consideration, it would not prevent the equipment from malfunctioning. Machines are indifferent to the rules of law. It is thus not surprising that attempts to expand the Pennsylvania Rule into this area have generally been unsuccessful. *The IOWA,* 34 F. Supp. 843 (D.C. Ore. 1940). Indeed, appellant has found no case applying the Rule to cases of navigational equipment malfunction, and appellees have cited none.

The Pennsylvania Rule has not been applied in cases involving claims for exoneration under COGSA. Thus, it is no assistance to appellees in establishing a causal relationship between the fathometer and the stranding if, as appellant contends it should, this Court rejects the testimony of Jensen as inadmissible. The rea-

son is clearly because COGSA, unlike the law applicable to collision and limitation cases, contains its own internal allocation of burden of proof, an allocation quite different from that created from the Pennsylvania Rule. Under COGSA a causal relation between alleged unseaworthiness and the casualty must be shown by claimants. The function of insuring statutory compliance by owners, fulfilled in collision and limitation cases by application of the Pennsylvania Rule, is fulfilled under COGSA, by shifting the burden of proof of due diligence to make the vessel seaworthy to owners. Thus, the rationale for applying the Pennsylvania Rule does not exist in COGSA cases. It is, of course, true that some cases, and again *The DENALI, supra,* is an example, have purported to apply the Pennsylvania Rule to Harter Act cases (46 U.S.C.A. Section 190, *et seq.*) but in those cases its application is superfluous because causation is irrelevant. If due diligence to make the vessel seaworthy has not been exercised by owners, exoneration is denied under the Harter Act regardless of cause. *The ISIS,* 290 U.S. 333 (1933). Indeed, the elimination of the built-in Pennsylvania Rule in the Harter Act is one of the major distinctions between that Act and COGSA. Under COGSA it is required that cargo interests (appellees herein) prove causal unseaworthiness.

Two additional points with respect to appellees' attempt to utilize the Pennsylvania Rule in conjunction with the R.D.F. deserve mention. First, the Pennsylvania Rule establishes causality when applicable. It does not establish privity or knowledge. As is well illustrated by *The DENALI, supra,* it is still necessary

that the statutory violation be within the privity or knowledge of management level personnel of the shipowner. Assuming, therefore, that there was a statutory volation with respect to the R.D.F., which appellant denies, what was the participation in this violation by management personnel of appellant? There is no finding of any such participation, and appellees in their briefs fail to mention it. The evidence, however, clearly demonstrates that the relevant managerial personnel of appellant had no privity or knowledge of any such statutory violation. Specifically, the evidence shows that they had instructed the masters of their vessels to comply with the statutory requirements with respect to the R.D.F. [Ex. 59], that they arranged for specialized tecnical assistance insuring that the equipment did so comply [Rep. Tr. p. 982], and that prior to the vessel's departure from Mobile in the Fall of 1961, the F.C.C. passed the equipment as meeting the statutory requirements [Rep. Tr. p. 961]. Under these circumstances, there can be no privity or knowledge of management personnel of any alleged statutory violation of the R.D.F.

Second, even assuming, contrary to what appellant has demonstrated, that there was a statutory violation and that management personnel of appellant had privity or knowledge of that violation, all that the Pennsylvania Rule does in the final analysis is to shift the burden of proof with respect to causality to appellant. *The AAKRE, supra.* The trial court in this case found that appellant sustained that burden [See Finding 8, Clk. Tr. p. 849].

To sum up, the Pennsylvania Rule is inapplicable to cases of navigational equipment malfunction and to *COGSA* cases, and even if it were not, no statutory violation was found by the trial court.

IV.

APPELLANT IS ENTITLED AS A MATTER OF LAW TO EXONERATION FOR CARGO LOADED PRIOR TO DECEMBER 25, 1961.

The initial burden when a shipowner attempts to establish its right to exoneration for cargo loss under COGSA is on the shipowner to show that the loss was caused, at least in part, by one of the excepted causes enumerated in COGSA (Section 1304(2)(a-p)). If the shipowner succeeds in carrying this burden (as appellant did here [see Finding 11, Clk. Tr. p. 859]), then it is incumbent upon cargo interests to show that the loss was also in part caused by unseaworthiness [this the lower court found appellees did, see Finding 4, Clk. Tr. p. 846].[9]

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[9]Appellant submits that appellees make a second error in interpretation of the Court's Findings of Fact when they contend that Finding of Fact 4 holds the CHICKASAW unseaworthy on two alternative grounds; first, that the fathometer was defective, and second, that the vessel was unseaworthy due to the lack of knowledge of the vessel personnel relating to the condition of the fathometer after it had been reported inoperative. While this misinterpretation is not as critical as that which leads appellees to contend that the trial court found "direct fault" of Waterman, it is relevant to the discussion of exoneration. Appellees create the impression that the fathometer itself was found to be defective by first quoting that portion of Finding 4 which states the CHICKASAW was unseaworthy because the fathometer was not in reliable working condition and then connecting that portion of the Finding with the portion dealing with the condition of the fathometer after the stranding, as though that were the reason the Court found the fathometer to be unreliable, ignoring entirely the reason the Court gave for its finding that the fathometer was unreliable (private-cargo brief, pp. 24 and 25). This illusion is furthered by their quotation of the so-called "even if" finding as though it were a separately stated paragraph when in fact it is not and is but a part of the over-all explanation the Court gives with respect to unseaworthiness [Contrast private cargo brief, at p. 26, with the last paragraph of Finding of Fact 4, Clk. Tr. p. 847]. When read in its entirety and in context, it seems clear that the Court gives the reason that it found the

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If cargo interests succeed in establishing causal unseaworthiness, the shipowner still may be exonerated if it shows, in the words of the statute:

> ". . . due diligence on the part of the carrier to make the ship seaworthy . . ." (46 U.S.C.A. Sec. 1304(1)).

See *Firestone Synthetic Fibers Co. v. M/S HERON,* 324 F. 2d 835 (2nd Cir. 1963). For the purposes of

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fathometer "was not in a reliable working condition," in the sentences immediately following in the same paragraph when it said:

> "On Monday, December 25, 1961, Jensen, the 3rd Mate of the SS CHICKASAW, started the fathometer, which he found was then inoperative, which condition he reported to the Master. The Master directed him to log that condition, which he did. No repairs were thereafter made to the fathometer and the fathometer was not thereafter determined to be in a satisfactory operating condition."

The so-called "even if" finding is simply an elaboration of the reason previously given by the Court for its finding that the CHICKASAW was unseaworthy, that is, the unreliable condition of the fathometer, an unreliable condition created by the Master's failure to check it after his receipt of a report that it was inoperative. The portion of the finding relied upon by appellees relating to the state of repair of the fathometer is in the same sentence with, and is a reply to, appellant's contention at the trial court that it should be exonerated because after the stranding the fathometer operated properly [Rep. Tr. p. 759] and relates to the condition of the fathometer some two weeks after the stranding during which period the vessel had been buffeted by heavy seas [Rep. Tr. p. 1323]. That the trial court was in doubt as to the actual condition of the fathometer immediately prior to the stranding, an issue upon which cargo interests had the burden of proof, see *Firestone Synthetic Fibers Co. v. M/S HERON,* 324 F. 2d 835 (2nd Cir. 1963), and chose to rest its determination of unseaworthiness on the uncertainty with respect to the fathometer's condition is illustrated by the following quotation from the Court's Memorandum Opinion:

> "The evidence is not clear whether the instrument was actually in a good working condition at the time of the grounding or not . . . Had the fathometer been turned on immediately prior to the grounding, it might well have functioned properly. But since it had been found by Jensen to be defective on one occasion and had not since been repaired or checked, the uncertainty as to whether it was operable constituted unseaworthiness for which the shipowner was responsible." [Clk. Tr. p. 761].

this showing each port at which cargo is loaded is the commencement of a new voyage for cargo loaded at that port. 46 U.S.C.A. Sec. 1303(1), *Mississippi Shipping Co. v. Zander & Co.,* 270 F. 2d 345 (5th Cir. 1959).

Appellant's position with respect to exoneration for cargo loaded prior to December 25, 1961, therefore, is simple. Regardless of when the unseaworthiness found by the Court originated (see footnote 9, *supra*), the only failure of due diligence found was that of Captain Patronas in failing to check the fathometer after Jensen's report of December 25, 1961, that it was not operating properly [Finding 5, Clk. Tr. p. 847, see also section I, *supra*]. Thus, there was no failure to exercise due diligence to make the vessel seaworthy at or prior to the commencement of the voyage with respect to that cargo loaded prior to December 25, 1961, and appellant having established negligent navigation as a cause of the loss, is entitled to exoneration under COGSA as to that cargo.

We turn now to the attacks upon appellant's argument contained in appellees' briefs. First, appellees contend that:

> "It would make no difference in the situation of common carriage of cargo under bills of lading . . . that the unseaworthiness originated after the cargo was loaded aboard."[10] Government's answering Brief, pp. 94 and 95.

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[10]In this portion of their Brief, the Government also makes reference to the rule of *The VALESCURA,* 293 U.S. 296 (1934). It is unclear to appellant what the Government's argument based on this rule is, but it should be noted that that rule deals with the burden of allocation when a loss is caused in part by an excepted cause and in part by a non-excepted cause. In this action, with respect to the cargo loaded prior to December

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This argument ignores the clear statement in Section 1303(1) that the carrier's obligation to use due diligence with respect to unseaworthiness is limited to the period of time at and prior to the commencement of the voyage with respect to that cargo. An extensive analysis of this point is found in *Mississippi Shipping Co. v. Zander, supra.* In that case, the failure to exercise due diligence to make the vessel seaworthy occurred at a port subsequent to the port of loading of the cargo in question because of a failure by the Master to inspect and repair an unseaworthy condition of which he had knowledge. In this regard, the case is quite close to that in the instant action. The contention there was made that exoneration should be denied because of the failure to exercise due diligence subsequent to the beginning of the voyage. The Court rejected this contention, stating:

> "At Santos, and at Montevideo and Buenos Aires, the Master stood as any other servant of the shipowner and any failure to exercise due diligence to make the vessel seaworthy with respect to cargo loaded at each respective port would be chargeable to the owner. But at subsequent ports and with respect to cargo previously loaded, the acts of the Master (and crew members) are those of management and navigation excusable under Section 4 unless, as is not the case here, the particular activities are those concerning the care, custody, receipt and delivery of cargo . . ." (Citations omitted) (at p. 350).

25, 1961, which can be easily identified by the bills of lading, the concurring causes of the loss were both excepted causes, i.e.: Negligent navigation and unseaworthiness not resulting from want of due diligence at or prior to the commencement of the voyage. The rule of the *VALESCURA* thus has no application.

Second, appellees contend that exoneration must be denied as to the cargo loaded prior to December 25, 1961, because of the "direct fault" of appellant. In large part this argument has been dealt with previously (see I, *supra*, and see footnote 9, *supra*) there was no finding of direct fault or indeed any finding of fault, or want of due diligence, or negligence, other than that of Captain Patronas after December 25, 1961, as found in Finding of Fact 5. Indeed, the lower Court rejected a proposed finding that appellant failed to exercise due diligence because of a failure to inspect [contrast Clk. Tr. p. 899 with Clk. Tr. p. 847] which is the very factual basis upon which appellees claim that the so-called finding of direct fault should be sustained (see private cargo brief, p. 25, and Government's Brief, p. 78). Under these circumstances then appellees have the heavy burden of convincing this Court that the trial court's rejection of the so-called direct fault was clearly erroneous and that this Court should substitute its judgment on the evidence for that of the trial court. This they have not done or even attempted to do. For indeed the evidence supporting the trial court's rejection of appellees' contention is substantial. Briefly, the record shows:

(1) That the reasonably prudent shipowner does not periodically inspect the electronic components of the fathometer [Rep. Tr. p. 488, Captain Slack, Mr. Haldane, p. 1328, Captain Khune, p. 1083] nor would it be good practice to do so [Rep. Tr. p. 487];

(2) That when the CHICKASAW was in drydock immediately prior to departure from Mobile for Japan, the non-electronic components of the fathometer were inspected [Rep. Tr. p. 1245];

(3) At the time of the vessel's drydocking in Mobile, inquiry was made by shoreside personnel of the vessel's

navigating officers as to the functioning of the fathometer and it was reported to be in good condition [Rep. Tr. p. 1242]; and

(4) The fathometer operated properly on the trip in question prior to Jensen's report [Rep. Tr. p. 333] and even immediately after the stranding [Rep. Tr. p. 759].

What is left, therefore, is appellees' third contention, namely, that as a matter of law appellant's failure to periodically disassemble and inspect the electronic components of the fathometer constitutes a lack of due diligence. In support of this position, appellees rely principally upon three cases (private cargo brief, p. 27); *Ionion Steamship Co. of Athens v. United Distillers,* 236 F. 2d 78 (5th Cir. 1956); *Ore Steamship Corporation v. D/SA/S Hassell,* 137 F. 2d 326 (2nd Cir. 1943); and *Standard Oil Company v. Angelo-Mexican Petroleum Corporation,* 112 F. Supp. 630 (S.D. N.Y. 1953). What these cases hold, however, is not that a shipowner in order to be entitled to exoneration under COGSA must conduct detailed inspections, but rather that where the circumstances are such that a reasonable shipowner would make an inspection, it is want of due diligence to fail to do so. This, of course, is nothing more than the normal test of due diligence, *i.e.,* what would be done by a reasonably competent shipowner. *National Sugar Refining Co. v. M/S LAS VILLAS,* 225 F. Supp. 686 (E.D. L.A. 1964). The language of the Court of Appeals in the *Ionion* case is indeed appropriate:

> "(W)here the standard of due diligence is applicable, it comprehends inspection and investigation, *where prudent,* to determine the existence of deficiencies before they become critical, and the failure to discover defects which examination would necessarily have disclosed is the very absence of due diligence." (236 F. 2d at 84). (Emphasis added).

Private cargo simply emphasizes the wrong portion of the quotation (private cargo brief at p. 27), for it clearly indicates that inspection and investigation is called for "where prudent." This language is even more meaningful in light of the facts in the *Ionion* case. In *Ionion,* the ship in question stranded twice in September of 1951, as a result of a defect in the steering gear. In August of 1951, the vessel had been through a severe hurricane in which it sustained substantial damage, after which the beginning of steering difficulties were noted in the log. Despite this, when the general hurricane damage was repaired, no inspection or repair was undertaken of the steering mechanism. Of course, when a vessel, has been through a severe storm suffering damage and the owner is put on notice of the possibility of damage to the steering mechanism, it is "prudent" when the damage from the storm is repaired to investigate the steering mechanism. This does not mean, however, that any inspection any ingenious cargo claimant can dream up is required in order for a shipowner to obtain exoneration under COGSA, and specifically it does not mean that a shipowner is under any obligation to disassemble a fathometer for inspection when it has no report of any malfunction. The other two cases are the same; in neither is there anything that even suggests that the trial court in this case as a matter of law should have found that appellant lacked due diligence to make seaworthy because it did not periodically disassemble the electronic components of the navigational equipment.

V.

LIMITATION OF LIABILITY SHOULD HAVE BEEN GRANTED AS A MATTER OF LAW.

A. Introduction.

The gist of appellant's argument, considered in some detail in its Opening Brief (pp. 21-46), may be quite briefly summarized:

The trial court denied exoneration to appellant because of unseaworthiness it found occurred through Captain Patronas' lack of due diligence. Thus, the only question remaining was: Was Captain Patronas' want of due diligence within the privity or knowledge of managerial personnel of appellant? The trial court found that it was because Captain Patronas had been delegated the "managerial responsibility" of ascertaining the condition of navigational equipment in foreign ports and obtaining their repair if necessary. This conclusion in turn is based upon the erroneous legal assumption, unsupported by either the policy of the Limitation Act or the consistent trend of cases interpreting it, that the non-delegable managerial responsibility to exercise due diligence to make a vessel seaworthy in each port in which it loads cargo under COGSA is also a non-delegable managerial responsibility for the purposes of the Limitation of Liability Act. There is no question but that Captain Patronas was delegated the task of ascertaining the condition of navigational equipment in foreign ports and arranging for necessary repairs. The error is in the legal assumption that this is a "managerial responsibility" for the purposes of limitation of liability and that therefore negligence in performing it is sufficient to deny limitation (See Appellant's Op. Br. pp. 44-46).

Appellees have declined to directly respond to this analysis; specifically, they do not contend that owners non-delegable duty to exercise due diligence at each port in which cargo is loaded for the purposes of COGSA serves a similar function under the Limitation Act. Instead, they have mounted a multifaceted attack upon appellant's position based in part upon what has already been demonstrated to be their erroneous assumption that there was a finding of so-called "direct fault" on the part of WATERMAN, and in part upon the voluminous citation of cases, for the most part without analysis of the facts of those cases, purportedly imposing various absolute obligations upon owners in limitation of liability cases. In order to properly respond to these arguments, it is necessary to analyze with some care the policy basis of the Limitation Act as it is presently interpreted.

B. The Policy of the Limitation Act.

We start with the proposition that originally the Limitation of Liability Act, and its non-statutory predecessors in other maritime nations, had as its purpose limiting the liability of the owner to that which he put at risk when the ship departed from his control and in particular insulating the owner from the negligent acts of the master, members of the crew, and other agents (See Appellant's Op. Br. pp. 22-38). This concept was, and is, relatively easy to apply to the case of an individual owner of a vessel. Absent personal participation in the fault causing the loss, the individual owner is insulated from liability by delegation of authority to competent agents, including the master and crew members.[11]

[11]One area of some doubt remains ever in the case of the individual owner. That is the situation in which the individual owner delegates all authority with respect to the management

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The analysis with respect to corporate owners, however, is not so simple. One possible interpretation would be that since corporate owners always act through agents, a corporate owner always has privity or knowledge of the negligence of any of its employees and thus is never entitled to limitation. This quite obviously would vitiate the limitation statute completely with respect to corporate owners and has been uniformly rejected. See *e.g. Coryell v. Phipps,* 317 U.S. 406 (1943). Equally unacceptable is the opposite extreme, namely, that a corporation does not have privity or knowledge unless it takes official corporate action that is negligent, as for example by a resolution of the Board of Directors. This approach also has been rejected. See *Coryell v. Phipps, supra.* It soon became accepted, therefore, that a corporation would be denied limitation if the privity or knowledge or fault were that of managerial or supervisory personnel with authority over the phase of business out of which the loss occurred. *Craig v. Continental Insurance Co.*, 141 U.S. 638 (1891). Even this test, however, does not satisfactorily solve the prob-

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of the vessel to an agent, which agent in turn negligently carries out some of these duties. The cases are unclear as to whether or not in such circumstances the individual owner is insulated from liability by the delegation. See the analysis of this point in *Admiral Towing Co. v. Woolen,* 290 F. 2d 641 (9th Cir. 1961). Appellees contend that the *Admiral Towing* case stands for the proposition that limitation is available only against the "instantaneous negligence" of the Master and members of the crew. (See private cargo brief, p. 47, government's answering brief, p. 31.) There is no policy justification for such distinction. As will be demonstrated the appropriate policy determinant is the degree of effective control which can be exercised. Thus, it is true that in general instantaneous negligence of the Master and crew members does come within that area in which effective control cannot be exercised. This does not mean, however, that there are not other such areas. Indeed, to the extent that this point is discussed at all in *Admiral Towing,* it clearly indicates that shoreside duties can be delegated and limitation granted (See 290 F. 2d at p. 647).

lem because on varying facts there may be a wide disparity between who fills this particular definition and, without more, it could put a premium on intentional ignorance. Thus, the limitation cases dealing with corporations have through the years evolved the doctrine of "Effective Control."

The development of this doctrine was foreshadowed by cases such as *In re Sanford Ross,* 204 Fed. 248 (2nd Cir. 1913), and *The ARGENT,* 1940 A.M.C. 508 (S.D. N.Y. 1915). In both of these cases the vessels concerned were barges traveling over short distances and the defects causing the loss against which limitation was sought were obvious defects of long standing. Thus, in both of them the ground of decision appears to be that the vessels were within the effective control of the owners. Limitation, therefore, was denied because of the negligence of an employee of relatively low status. But it was clearly pointed out in *The ARGENT, supra,* that:

> "The philosophy of ship owner's limitation seems to me this: There are so many things which ship owners must do by deputy, and must have done at great distances and under circumstances where human falability is particularly prone to produce error, that they have long been saved by statute from the consequences of their agent's acts."

The doctrine was brought to fruition as the ground of decision in the Supreme Court case of *Spencer-Kellogg Co. v. Hicks,* 285 U.S. 502 (1932). In that case a launch which was used to carry the petitioner's employees to work over a distance of about a mile and a third was known to be unsafe to utilize when there was ice on the river. An employee of managerial status, Stover, was in charge of the operation and had given the master appropriate instructions not to utilize the

vessel under these conditions. The master nonetheless did so, the vessel ran into ice, and sank with heavy loss of life. Limitation was sought on the theory that the delegation to the master of the duty not to sail when there was ice on the river insulated the owners from liability. The Court found to the contrary relying havily on the opportunity available to Stover to exercise effective control since with very little effort he could have ascertained for himself whether or not there was ice on the river and taken steps to see that the master obeyed the rules. The situation was specifically contrasted with the situation when a vessel was great distances from the managerial authority in the corporation where such control could not be exercised. In those situations the owner:

> "must rely upon the master's obeying the rules and using reasonable judgment." (At page 511).

However, under the circumstances of that case, Stover was required to use "reasonable diligence" to exercise effective control and because of his failure to do so limitation was denied.

It should be noted that the duty is not that of absolute control, even in the home port, but that it is a practical doctrine of using reasonable diligence to exercise effective control under the circumstances of the situation. This, of course, is quite similar to the standard of due diligence under COGSA (see section IV, *supra*). There is, however, a key distinction; under COGSA a failure to exercise due diligence at or prior to the commencement of the voyage by *any* employee is sufficient to deny exoneration whereas under the Limitation Act that failure must be brought home to someone of *managerial* or *supervisory* status.[12] The basis of this dis-

[12]This distinction was in part overlooked by Gilmore & Black in *The Law of Admiralty* in their oft-quoted language (at p. 696), discussing the relationship between COGSA and limita-

tinction as was demonstrated in Appellant's Opening Brief, pages 21-45, is the difference in background between COGSA and the Limitation of Liability Act that led to COGSA's enumerating certain specific areas beyond the effective control of owners for which entire exoneration will be permitted while leaving to the Limitation Act the remaining areas beyond owner's effective control where exoneration will be denied but limitation granted.

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tion. The single case cited by Gilmore & Black in support of the proposition that the standard of care imposed on the owner by the Limitation Act is the same as that imposed by COGSA does not support that proposition. This case is *Accinato, Ltd. v. Cosmopolitan Shipping Co.*, 99 F. Supp. 261 (D. Md. 1951), reversed in part 199 F. 2d 134 (4th Cir. 1952). In that case the shipowner, a sub-time charterer, raised in defense both the Fire Statute (46 U.S.C.A. Sec. 182) and the fire exception of COGSA, Section 1304(2)(b). The trial court noted that the former was not available to the charterer because it was not a charterer who manned and victualled its own vessel. However, it noted that this was of no great importance because these two sections were substantially equivalent. It should be noted, however, that the specific section of COGSA in question is the only section of COGSA which incorporates some of the language from the limitation statute, namely, "privity or knowledge" and thus, since the fire statute language "design or neglect" had for some considerable time been considered to be equivalent to the limitation statute "privity or knowledge" it is, of course, reasonable to equate the fire exemption of COGSA with the fire statute. The reason for the equivalence, however, is not that the limitations statutes now require the higher duty of COGSA, but that the specific exemption of COGSA concerned requires only the lower standard of the limitation statutes. This fact is demonstrated by the opinion of the Court of Appeals in which exoneration under the COGSA fire exemption is permitted on the authority of *Earle & Stoddard v. Ellerman's Wilson Line*, 287 U.S. 420 (1932) because in the *Accinato* case the lack of due diligence, if any, was that of someone to whom the duties concerned had been properly delegated. Under the normal COGSA standard this would offer no protection but under COGSA fire exemption it did. This case should be contrasted with *Moore-McCormack Lines, Inc. v. Armco Steel Corp.*, 272 F. 2d 873 (2nd Cir. 1959), which is a recent case which does "restate" the lower standard of duty imposed by the Limitation Act. It also should be noted that Gilmore & Black somewhat inconsistently do make the appropriate distinction in a later section. See Section 10-22 at page 698.

Several propositions follow from the doctrine of effective control which are of assistance in analyzing appellees' argument.

First, owners must conduct or arrange for competent periodic inspections, particularly of the vessel's hull, *where prudent.* This is the explanation of such cases as *The CALVERT,* 51 F. 2d 494 (4th Cir. 1931); *In re Petition of Henry DuBois' & Sons Co.,* 189 F. Supp. 400 (S.D. N.Y. 1960); *Dexter-Carpenter Co. v. New York, O. & W. Ry. Co.,* 50 F. 2d 270 (S.D. N.Y. 1931); *The MIAMI,* 43 F. 2d 562 (S.D. N.Y. 1930); and *Hansen v. Fidelity and Columbia Trust Co.,* 68 F. 2d 144 (6th Cir. 1933).[13]

In each of these cases the vessel in question was a barge or lighter operating in close proximity to the owner's shoreside organization and easily within their effective control. In addition, each of them involved old vessels with deteriorating hulls, not subject to either Coast Guard or Classification Society periodic inspections where the owners, although easily able to do so, did not replace this type of inspection with any inspection of their own. Particularly appropriate is the lan-

[13]A similar case is *Republic of France v. French Overseas Corp. (The MALCOLM BAXTER, JR.),* 277 U.S. 329 (1928). In that case the owners had just purchased the vessel, *without a warranty of seaworthiness,* and thus had an affirmative duty to determine its condition prior to using it. For their failure to do so they were denied limitation. However, as the Court of Appeals in *Earle & Stoddard v. Ellerman's Wilson Line,* 54 F. 2d 913 (1931), aff'd. 287 U.S. 420 (1932), pointed out, immediately preceding the language quoted by private cargo (at p. 48), had this failure "been only that of the vessel's master, the benefits of the Harter Act would have been lost, but not the benefits of the Limitation of Liability Act." Private cargo tries to use this case, as discussed in the *Earle & Stoddard* case, to distinguish that case from the instant one, completely ignoring the Supreme Court's ruling in *Earle & Stoddard* that there is *no* non-delegable duty to use due diligence to make seaworthy for the purpose of the limitation statute.

guage of the Court in *In re Petition of Henry DuBois' & Sons Co., supra,* at page 403:

> "The derrick was not a seagoing vessel. Its dredging operations were confined to the New York Harbor. Except when actually dredging or in tow, it really never went beyond the immediate control and direction of the shoreside executive and managerial employees of petitioner. It was regularly available for inspection by Roselino as well as other managerial employees and executives of petitioner.
>
> "Petitioner had no system or regulation for regular inspection or drydocking, although it owned and operated about 30 vessels. No routine inspection had ever been made of the TRENTON. Thus it closed its eyes to what would have been obvious and readily revealed upon proper and periodic inspection."

These cases should be contrasted with *The CITY OF BANGOR,* 13 F. Supp. 648 (D. Mass. 1936). In this case the petitioner bought the vessel and had it reconditioned in 1929. Then as a result of the depression it was not put into service. Instead, in 1931, it was moved to the docks of the Federal Wharf Company and placed in the care of Captain Ingersoll who had previously been in the service of the company as a master and whose sole duties were to care for this vessel and other vessels while they were tied to the dock. The vessel sank damaging the pier. One of the conditions contributing to the sinking was that caulking had come out of some of the seams above the water line. The Court in granting limitation said:

> "The managing agents of the vessel were in New York. They had the vessel's hull repaired at the time they purchased her in 1929. They then put her in the hands of a competent master whose duty

> it was to report to them if at any time the vessel became unseaworthy. There was nothing to show that Captain Ingersoll ever made any such report."

It seems obvious that these cases dealing with old rotten barges never venturing far from the immediate range of supervision of managerial personnel, have little relevance to the instant action. In particular, they do not stand for the proposition that there is an absolute duty to discover whatever any inspection, without regard for the circumstances, might disclose. Yet this is what is at the root of appellees' contentions relating to inspection (see private cargo brief, pp. 28-34 and Government's answering Brief, pp. 78-86).

Second, owners, through their managerial level personnel, must inspect, inquire, and instruct if they have a duty to act arising from some knowledge that there probably is a defect making the vessel unseaworthy. The language most often quoted in this context is that from *The CLEVECO,* 154 F. 2d 605 (6th Cir. 1946), at page 613, as follows:

> ". . . Knowledge means not only personal cognizance but also the means of knowledge—*which the owner or his superintendent is bound to avail himself*—of contemplated loss or condition likely to produce or contribute to loss, unless appropriate means are adopted to prevent it." (Emphasis added).

This language, however, was in the context of the case in which, as a result of a restriction on a certificate issued by the Coast Guard, the owner was "definitely on warning that the ADMIRAL was a dangerous vessel to be handled with the utmost care." (at p. 613).

Other similar cases include *Tug Carrier Mack-Barge 204,* 194 F. Supp. 383 (S.D. Ala. 1961); *Ruth Conway Tug Hustler,* 75 F. Supp. 574 (D. Md. 1947); *CITY*

OF BRUNSWICK, 6 F. Supp. 597 (D.C. Mass. 1934); *MIDLAND VICTORY*, 178 F. 2d 243 (2nd Cir. 1949); *THE VESTRIS*, 60 F. 2d 273 (S.D. N.Y. 1932); *Great Atlantic and Pacific Tea Corp. v. Brasilerio*, 159 F. 2d 661 (2nd Cir. 1947); *The SILVER PALM*, 94 F. 2d 776 (9th Cir. 1937); and *States SS Co. v. United States* (*The PENNSYLVANIA*), 259 F. 2d 458 (9th Cir. 1958). In each of these cases managerial level personnel of the owners had knowledge that should have led a reasonable manager to suspect an unseaworthy condition and thereby gave rise to an affirmative duty to act. This point was perhaps best stated in *States SS Co. v. United States, supra (The PENNSYLVANIA)*, at page 472, where this Court said:

> "Mere non-action on the part of managing agents in allowing their subordinates to prepare a ship for departure will not serve to excuse the owner from any portion of his responsibility *if the knowledge of the managing agent is such that they ought to inquire and inspect.*" (Emphasis added).

This statement was made in the context of a case in which the marine superintendent, Vallet, knew of evidence of crack sensitivity of vessels of the class to which the PENNSYLVANIA belonged, knew that the possibility of cracks and sensitiveness was increased when a vessel had a history of prior cracks as did the PENNSYLVANIA, and knew that the danger was the greatest when the vessel went through cold and stormy waters, where the normal route for a vessel in the PENNSYLVANIA's trade would take her. Under these circumstances the Court held that Vallet, who was of managerial status, had a duty to act and ascertain whether or not the vessel was crack sensitive, or at the minimum to instruct the master not to take the

vessel through those waters which would increase the danger.

It is upon cases such as these that appellees rely to support their position that owners' duties with respect to maintenance and repair of navigational equipment are not delegable: "That the owner has the knowledge of whoever he puts in charge of repairs . . ." (private cargo brief, p. 41).[14]

The preceding analysis, however, makes it clear that these cases do not support that proposition; nothing in any of them offers comfort for appellees in their contention that whomsoever the owner puts in charge of repairs is of managerial status. What they do stand for is the proposition that the managerial personnel have a higher, affirmative duty when those personnel are possessed of knowledge sufficient to give warning of probable unseaworthiness. A good illustration once again is *States SS v. The United States, supra (The PENNSYLVANIA)*. In that case privity and knowledge of owners was not found because Vallet was in charge of maintenance and repair of all vessels, as contended by appellees (private cargo brief, p. 41), but because Vallet, the marine superintendent, was concededly of managerial status and had an affirmative duty to act. This Court, in its two opinions on rehearing in the *States SS Co.* case, made it abundantly clear that if no managerial level employees of the shipowner had an affirmative duty to act, and had the only failure

[14]Appellees persist in asserting that they do not contend that the duty to arrange repairs for navigational equipment is under all circumstances non-delegable; instead they say that "owner is privy to the knowledge of the person who is in charge of maintenance and repairs." (private cargo brief, p. 43). Appellant can see no distinction between saying that the duty is non-delegable and saying that it is delegable but the owner is responsible for whatever is done by the person to whom the duty is delegated. In any event, this semantic quibble makes no difference to the substantive rule.

of due diligence been that of a non-supervisory agent, the lower court's granting of limitation would have been affirmed. The Court said:

> "Before there could be a finding or a conclusion such as Finding VII (the District Court's finding of no privity or knowledge) there would have to be a finding based on evidence that the negligence which the court found existed was that of a non-supervisory agent such as a *master* or an operating engineer." (At p. 464) (Emphasis added).

and:

> "The reason there is no basis for the limitation here is that the only persons whose negligence could have operated to bring about the unseaworthy condition, the only persons to whom the lack of due diligence could possibly be charged, were persons who were managing officers of the corporation. The court not only did not find that the failure to exercise due diligence was that of minor or subordinate employees, but the court could not have made such a finding."

and:

> ". . . and it also discloses that this lack of due diligence necessarily attached to the petitioner and not to any subordinate employees of petitioner." (p. 470).

and, finally:

> "The next question is: Whose lack of due diligence sent a ship thus unseaworthy to sea? The only conclusion that anyone would be entitled to draw from the evidence in this record was that Vallet was the one man so chargeable. This is not a case where it could be speculated that Vallett was off on vacation or not on duty when the failure to 'use the due diligence required by law to make the vessel seaworthy,' took place." (p. 473).

This reading of this Court's opinion in the *States Steamship* is confirmed in *Port of Pasco v. Pacific Inland Nav. Co., Inc.,* 324 F. 2d 593 (9th Cir. 1963), in which this Court said:

> "In the *States SS Co.* case, the District Court found that the loss of the ship was caused by its unseaworthy condition, and that the latter condition resulted from lack of due diligence. The District Court, nevertheless, felt that the unseaworthy condition of the vessel at the inception of the voyage was without the privity or knowledge of the owner and that liability could therefore be limited. In reversing on rehearing, the court felt that in view of the finding that the loss was caused by unseaworthiness resulting from lack of due diligence it could not be held that the loss was occasioned without the privity or knowledge of the owner *unless there was a finding that the negligence which the court found existing was that of a non-supervisory agent."* (Emphasis added) (at p. 599).

In the instant action the trial court did not find that the lack of due diligence was that of mangerial or supervisory personnel. It expressly found that it was a failure on the part of the master to take action, after notice to him, while the vessel was enroute between two foreign ports, of a possible defect in navigational equipment. In this case, therefore, we have what was lacking in the *States SS Co.* case; an express finding that the want of due diligence was that of non-managerial, non-supervisory personnel.

The third proposition that may be derived from the doctrine of effective control is that the degree of the control possible varies with the distance of the vessel from managerial personnel. The requirement of the

duty to exercise control varies accordingly. Delegation of duties will obviously be of less protection to an owner where a substantial shoreside organization with persons of managerial status exists because of their capability not only of delegating duties but also of close supervision of the work undertaken. The corollary proposition, of course, is that the further the vessel is from owner's shoreside organization and managerial personnel, the greater the amount of responsibility which can be delegated to non-managerial personnel without leading to a denial of limitation when the duties are performed negligently. This point is made clear by a contrast of *In re Petition of Henry DuBois' & Sons Co.*, 189 F. Supp. 400 (S.D. N.Y. 1960), in which limitation was denied, stressing the close proximity of the vessel at all times to the control of managerial personnel, with *Moore McCormack Lines, Inc. v. Armco Steel Corp.*, 272 F. 2d 873 (2nd Cir. 1959), in which limitation was granted when the failure of due diligence occurred at a foreign port distant from managerial personnel, with particular stress laid upon that distance.[15] It is not the function

[15]Private cargo contends (at p. 51 of their brief) that the *Moore-McCormack* case "is another of the cases which consistently recognizes that the owner *cannot* limit where he provides defective equipment at the start of a trip," thus apparently drawing a distinction (nowhere explained) between defective stowage and defective equipment. This is not correct. In *Moore-McCormack* the trial court found that the Assistant Marine Superintendent (who was conceded to be of managerial status) had *personally* incorrectly calibrated the stabilogauge, which factor contributed to the loss. There is, of course, no question but that negligence of managerial personnel themselves is sufficient to deny limitation if causally related to the loss. This does not mean, however, that non-negligent provision of an improperly calibrated stabilogauge would have led to a denial of limitation. The Court of Appeals, in any event, was able to disregard the allegedly improperly calibrated stabilogauge because evidence it allowed introduced proved the error of the lower court's finding of negligence. The important point in the *Moore-McCormack* case does not involve the stabilogauge at all; it is the Court's holding that an owner will not be denied limitation for leaving to vessel personnel in foreign ports that which, as a practical necessity, must be left to them.

which determines whether or not delegation is proper but rather the degree of effective control that managerial personnel can exercise at the time of the negligent act. If the reasonably prudent shipowner could, under the circumstances of the case, do no more than delegate the particular function to a presumably competent non-managerial employee, then effective control has been exercised and limitation will not be denied because of the negligence of the delegate. *Cf. Albina Engine & Mach. Works v. Hershey Chocolate Corp.,* 295 F. 2d 619 (9th Cir. 1961).

Appellees' authorities are not to the contrary. None of them even remotely resemble the situation in the instant action because in each the negligence either occurred while the vessel was within the easy control of managerial level personnel who negligently failed to exercise that control in a proper manner (see *e.g. Austerberry v. United States,* 169 F. 2d 583 (6th Cir. (1948)), or was the result of the failure of managerial level personnel with knowledge of probable unseaworthiness to take appropriate steps (see *e.g. The CLEVECO, supra*).

C. Conclusion.

The lower court's denial of limitation in this case can only be justified if a *shipowner has a non-delegable responsibility* prior to leaving every port to insure that all navigational equipment is in proper working order. The lower court found such a duty by carrying forward from COGSA the non-delegable duties arising from that statute. Appellees in this case would have this Court find such a duty in the nature of the function

itself. Neither principle nor authority supports either approach. The whole rationale of the Limitation Act is to insulate the owner from negligence over which he can exercise no meaningful control, which, as has been shown, was precisely the situation in this case.

It is respectfully submitted that for the foregoing reasons the decision of the District Court should be reversed.

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LEO J. VANDER LANS